A **CHEONG HUEY CHARN v. PANG MUN CHUNG & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN J
[APPEAL NO: WA-12BNCVC-172-11-2016]
7 AUGUST 2017

B

CONTRACT: *Illegality – Agreement – Sale and purchase agreement – Bank policy of not granting loans to non-citizens – Non-citizen vendor entered into sale and purchase agreement with purported purchaser to circumvent bank's policy – Whether purported purchaser was holding property on trust for purported vendor –* C *Whether sale and purchase agreement amounted to illegality – Whether against public policy – Whether purported vendor could rely on sale and purchase agreement in making claim against purported purchaser at court – Contracts Act 1950, s. 24(e)*

The respondents ('the plaintiffs'), who were siblings, commenced an action at the Sessions Court, claiming that they were the real owners of a property D which was registered in the appellant's ('the first defendant') name. According to the plaintiffs, the first plaintiff, a non-citizen, needed to raise capital for a business venture but Hong Leong Bank ('the second defendant') had a policy of not granting loans to non-citizens. In order to circumvent the said policy, the plaintiffs, as the registered proprietors of the property, E entered into a sale and purchase agreement ('the SPA') with the first defendant by which the first defendant purchased the house and applied to the second defendant for a loan. The plaintiffs contended that the property was conveyed into the name of the first defendant for the 'sake of convenience and appearance' in accordance with a 'transfer arrangement' F where the first defendant was to hold the property on 'trust' for the plaintiffs'. The plaintiffs and their family serviced the loan and the plaintiffs' parents stayed in the property. However, the loan later went into default when the plaintiffs faced financial difficulties and this prompted the second defendant to commence foreclosure proceedings. The plaintiff tried to G communicate with the first defendant to settle the matter but the first defendant was unresponsive. Following a public auction of the property, the plaintiffs' parents were evicted. The auction exercise yielded a surplus sum of RM431,201.11 ('the surplus sum') which went to the first defendant. Before the Sessions Court Judge ('the SCJ'), the plaintiffs submitted that they were entitled to the surplus sum under a 'transfer arrangement' or 'trust'. In H resisting the plaintiffs' claim, the first defendant averred that she purchased the property pursuant to the SPA and the plaintiffs' parents were staying in the house under a tenancy. Deciding in favour of the plaintiffs, the SCJ was of the opinion that, *inter alia*, the first defendant was merely holding the property and the surplus sum on trust for the benefit of the plaintiffs. The I SCJ ordered the surplus sum to be released to the plaintiffs ('the SCJ's order'). Hence, the present appeal by the first defendant. Despite not

pleading that the SPA was illegal or a sham at the Sessions Court, the first defendant's line of arguments in her appeal were that (i) the SPA amounted to illegality, was against public policy and therefore, caught by s. 24(e) of the Contracts Act 1950 ('the Act'); and (ii) the plaintiffs relied on their dishonesty in making their claim. Pending disposal of the present appeal, the first defendant had obtained a stay of the SCJ's order so that the surplus sum would remain with the second defendant. The primary issues that arose for the court's adjudication were (i) whether the SPA was valid and could be relied on by the plaintiffs; (ii) whether the SPA was caught by s. 24(e) of the Act; and (iii) whether the first defendant, who had not pleaded that the SPA was a sham agreement, may contend that the property had passed to her through the transfer of the property and that she was entitled to any monetary benefit that flowed as a result of such transfer.

Held (allowing appeal with no order as to costs):

(1) Based on the plaintiffs' SOC and the first plaintiff's evidence, the SPA was a sham agreement. It was a façade to deceive the second defendant into thinking that the first defendant was a real purchaser when, in fact, there was no sale. It was a trust agreement. The plaintiffs could not be allowed to seek the assistance of the court because if the court were to enforce the trust, it would mean that the court was asked to enforce a trust borne out of a sham agreement/illegal and in circumstances where the plaintiffs have soiled their hands. Since the plaintiffs' claim was based on a 'transfer arrangement' or 'trust' which arose under a sham SPA, the first defendant's appeal was allowed on the ground that the court would not assist the plaintiffs in enforcing a 'transfer arrangement' or 'trust' which was borne out of a sham or illegal SPA. (paras 66, 67 & 74)

(2) The SPA offended s. 24(e) of the Act. However, a property could pass under an illegal contract which has been executed. In this case, the title to the property had passed under an 'executed' contract *albeit* that it was a sham SPA. Even though illegality or sham agreement was not pleaded by the first defendant, regardless of the stage at which the case was progressing, once a trial or appellate court was apprised of the matter, it could not then be ignored. Conceptually, if the SPA was a sham agreement, then it was a sham agreement right from the beginning. The fact that the point was not raised in the court below merely showed that the issue escaped the attention of those having conduct of the case in the court below. The first defendant had, on appeal, properly brought the matter up by way of memorandum of appeal and argument. (paras 68, 70, 72 & 73)

(3) The plaintiffs indicated that they would be filing an appeal to the Court of Appeal and sought for a preservation order such that the second defendant would keep the surplus sum pending disposal of the plaintiffs' appeal. Now that the appeal was decided in favour of the first defendant, as a matter of fairness and justice, the surplus sum should continue to remain with the second defendant pending disposal of the plaintiffs' appeal to the Court of Appeal. The preservation order was granted. (paras 76, 77, 81 & 82)

Case(s) referred to:

China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd [2014] 7 CLJ 644 CA ***(refd)***

John Ambrose v. Peter Anthony & Anor [2017] 6 CLJ 465 CA ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

Mustafa Osman v. Lee Chua [1996] 3 CLJ 494 CA ***(refd)***

Philip Bell Booth & Anor v. Navaratnam Narayanan [2016] 9 CLJ 37 CA ***(refd)***

Snook v. London and Vest Riding Investments Limited [1967] 2 QB 786 ***(refd)***

Suntoso Jacob v. Kong Miao Ming & Anor [1986] 2 MLJ 170 ***(refd)***

Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor [2017] 6 CLJ 368 CA ***(refd)***

Tinker v. Tinker [1970] 1 All ER 540 ***(refd)***

Tinsley v. Milligan [1993] 3 All ER 65 ***(refd)***

Verschures Creameries Limited v. Hull and Netherlands Steamship Company, Ltd [1921] 2 KB 608 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24(e)

National Land Code (Penang and Malacca Titles) Act 1963, s. 108

For the appellant - Paari Perumal & M Ramachandran; M/s Rama Samuel & Assocs
For the respondents - Ronnie Yoon Kok Seng & Jefrey Wong Peng Ann; M/s Scully Yoon

Reported by Najib Tamby

JUDGMENT

S Nantha Balan J:

Introduction

[1] These are my grounds of judgment in respect of an appeal by the first defendant against the decision of the learned Sessions Court Judge ("the SCJ") dated 27 October 2016 after a full trial, by which the SCJ allowed the plaintiffs' claim with costs of RM25,000. Essentially, the SCJ declared that the plaintiffs were entitled to the disputed sum of RM431,201.11, which is the subject matter of the suit in the court below and in this appeal before me. The sum of RM431,201.11 is presently held by Hong Leong Bank Berhad. They were the second defendant in the court below.

[2] For convenience, I shall refer to the parties by the following nomenclature: first defendant/appellant as "Dl" and the respondents as "the plaintiffs". Where necessary, I shall specifically refer to the first plaintiff as "P1". Hong Leong Bank Berhad shall be referred to as "D2". The sum of RM431,201.11 shall be referred to as "the surplus sum". The record of appeal shall be referred to "AR". The SCJ's grounds of judgment shall be referred to as "GOJ".

[3] D2 is not a party to this appeal and they await the decision of this appeal, upon which the surplus sum will be released. The surplus sum came about as a result of a public auction which was carried out by D2 on 17 December 2014 in respect of a property known as No. 37, Lorong Badang 13, Taman Castlefields, 57100 Kuala Lumpur ("the property"). The property was charged to D2 as security for a loan that was given to D1.

Background Facts

[4] At the time the property was sold at the auction on 17 December 2014, it was registered in the name of D1 as the registered proprietor. The plaintiffs' pleaded case is that D1 was at all times holding the property on trust for the plaintiffs pursuant to a sale and purchase agreement dated 30 June 1999 ("the impugned SPA") entered between D1 (as so-called "purchaser") and the plaintiffs (as so-called "vendors"). The pith and substance of the plaintiffs' claim is that the surplus sum belongs to them pursuant to an alleged "transfer arrangement" or a "trust" which is evidenced by the impugned SPA. I turn now to background and genesis to the impugned SPA.

[5] The plaintiffs are siblings. P1 and D1 were at one time involved in a romantic relationship with each other. The romantic relationship lasted a few years. The plaintiffs were previously the registered owners of the property.

[6] The property was transferred to them pursuant to a sale and purchase agreement dated 25 February 1992 entered into between the plaintiffs (as purchasers) and Mdm Tan Heng Hong @ Tan Siew Foong ("Mdm Tan") (as vendor). Mdm Tan is the wife of Mr Phang Kok Wai @ Pang Kok Yew ("Mr Phang") and she is also the mother of the plaintiffs. At all material times, Mr Phang and Mdm Tan resided in the property. They lived in the property until after the auction, when they were compelled to vacate the property.

[7] According to the plaintiffs' pleaded case, what gave to the impugned SPA is that they intended to raise capital for a new business venture and this had to be done *via* financing of the property with a local financial institution. At the material time, the property was charged to Maybank Finance Berhad and the redemption sum as at 18 August 1999 was RM63,435.18. The new business venture that the plaintiffs had in

mind was a laundry business which was to be run by Mr Phang. P1 was a permanent resident in Malaysia. He was a non-citizen. According to D2's internal lending policy, loans would not be granted to non-citizens.

[8] Thus, the plaintiffs decided to apply for a loan by using the impugned SPA so as to give the impression or appearance to D2 that the purchaser was D1 and that the loan was being sought by Dl. The plaintiffs and D1 executed the impugned SPA wherein D1 purportedly "purchased" the property for a purchase consideration of RM95,000.

[9] D1 "applied" to D2 for a loan of RM76,000 which is equivalent to 80% of the purchase consideration under the impugned SPA. I have deliberately described the sale and purchase agreement as the impugned SPA because this appeal turns on whether this was a genuine sale and purchase agreement or a "sham agreement" and if it is the latter, whether it can form the basis for an enforceable trust. To put in proper context, the question is whether the court will assist the plaintiffs in giving them reliefs based on a "trust" which is predicated on a "sham agreement".

Sham Transaction

[10] In this regard, the classic definition of a "sham transaction" or "sham agreement" is to be found in the seminal speech of Diplock LJ in *Snook v. London and Vest Riding Investments Limited* [1967] 2 QB 786 at p. 802 C-F, where he said:

> As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham", it is, I think necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

[11] Thus, a sham is a pretense and involves a finding that the real agreement between the parties is something other than that which appears on the face of the documents.

[12] As stated earlier, the reason for the sham or facade giving rise to the impugned SPA was that at all material times, P1 was a permanent resident in Malaysia and was the holder of a "red" identity card. At the material time, financial institutions in Malaysia had a policy of not giving loans to non-citizens. Thus, in order to circumvent this policy, the impugned SPA was created to give D2 the appearance that the impugned SPA was a true and genuine sale and purchase agreement.

Admission Of Sham Transaction

[13] Counsel for D1 emphasised very trenchantly that P1 admitted at the trial (without hesitation) that this was not a genuine sale and purchase agreement and that it was never intended to be a real sale and purchase agreement. In fact, the plaintiffs own pleaded case is that pursuant to the impugned SPA, the property was registered in Dl's name and was to be held on "trust" for the plaintiffs. According to the plaintiffs, the loan instalments to D2 were all paid by the plaintiffs and not by D1. Further, Mr Phang and Mdm. Tan resided in the property at all times until they were evicted at the end of 2014, consequent upon the property being auctioned off by D2. According to the plaintiffs, they did everything possible to prevent the property from being auctioned off whereas D1 was entirely passive and indifferent. She was not interested. According to the plaintiffs, D1 demonstrated such indifferent because the true owners were the plaintiffs and D1 was merely holding the property on trust.

[14] P1 and D1 broke up or terminated their romantic relationship around 2001 which is about two years after the impugned SPA was executed. Thereafter P1 attempted to get DI to execute a power of attorney ("PA") but D1 refused. P1 did not pursue the matter thereafter. But the plaintiffs kept paying the monthly loan instalments into the loan account which was in Dl's name. D1 claims that P1's request for a PA is evidence of acknowledgment that D1 was the real owner.

Non-Performing Loan

[15] However, after having serviced the loan for several years, the plaintiff's faced financial difficulties and the loan eventually became a non-performing-loan ("NPL"). D2 took steps to foreclose on the property *via* Kuala Lumpur High Court Originating Summons No. 24NCC-175-2011. The property was initially scheduled to be auctioned on 28 March 2014. The plaintiffs apparently spoke to D2's debt recovery officer ("PW3") who advised them to pay RM10,200 into Dl's loan account with D2 in order to persuade D2 to call off the auction. The sum of RM10,200 was in fact paid into Dl's account with D2 and the auction was called off. However, this was only a short-term reprieve. The next auction was held on 17 December 2014. P1 tried to communicate with DI over the matter in a desperate attempt to settle the matter. But D1 was unresponsive.

[16] According to P1, he had located buyers who were willing to buy the property. But P1's attempts at communicating with D1 was met with nil response. According to the SCJ, P1's conduct in making payment of RM10,200 to call off the auction on 28 March 2014 and the various WhatsApp messages to D1, cumulatively indicate that P1 was most anxious as to the fate of the property whereas D1 was oblivious or disinterested in

what was going on. According to the SCJ, these are all "tell-tale" signs or indicators of P1 being the real owner and that D1 was merely "trustee" of the property as alleged by the plaintiffs. In the event, the plaintiffs were not able to stop the auction and the property was auctioned off on 17 December 2014. Consequently, Mr Phang and Mdm Tan were evicted. However, the auction yielded a surplus sum of RM431,201.11. D1 woke up and became interested. D2 now holds the surplus sum in Dl's account and is awaiting the outcome of this appeal. Previously, the plaintiffs had obtained an injunction to restrain the release of the surplus sum to Dl. After the decision was delivered by the SCJ in favour of the plaintiffs, D1 obtained a stay to prevent the release of the surplus sum to the plaintiffs, pending disposal of the present appeal.

Issue At Trial

[17] I turn now to the trial. The learned trial judge decided that the only issue to be determined was whether there is an agreement/arrangement between the plaintiffs and D1 wherein D1 was to hold the property on trust for the plaintiffs and their family. At para. 16 of the GOJ, the SCJ identified the issue as follows:

> sama ada terdapat persetujuan antara Plaintif-Plaintif dan Defendan Pertama bahawa Defendan Pertama memegang hartanah tersebut atas amanah untuk manfaat Plaintif-Plaintif dan keluarganya.

SCJ's Grounds Of Judgment

[18] The relevant findings of the SCJ as per the GOJ *vis-a-vis* the issue of the existence of a trust arrangement are as follows:

> [17] Di dalam kes ini, tidak dapat dinafikan bahawa terdapat perjanjian jual beli yang telah dimasuki antara Plaintif-Plaintif dan Defendan Pertama bagi hartanah tersebut pada 30.6.1999. Adalah tidak dinafikan bahawa Plaintif Pertama dan Defendan Pertama adalah sepasang kekasih semasa perjanjian jual beli itu dimasuki. Adalah juga tidak dinafikan bahawa akibat terdapat kegagalan pembayaran ansuran bulanan, hartanah tersebut telah akhirnya dilelong oleh Defendan Kedua dengan meninggalkan baki di dalam akaun Defendan Pertama wang sejumlah RM431,201.11.
>
> [18] Plaintiff-Plaintif mengatakan bahawa walau pun terdapat Perjanjian Jual Beli, Defendan Pertama sebenarnya telah memegang hartanah tersebut atas amanah untuk kepentingan dan manfaat Plaintif-Plaintif dan keluarganya. Ini dinafikan oleh Defendan Pertama.
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> [19] Dalam usaha Plaintif membuktikan pengataannya itu, Plaintif telah mengemukakan keterangan bahawa atas hubungan sebagai pasangan kekasih antara Plaintif Pertama dan Defendan Pertama, maka timbul kepercayaan oleh Plaintif Pertama terhadap Defendan Pertama agar hartanah tersebut dibiayai semula untuk mendapatkan

wang iaitu dengan satu perjanjian jual beli dimasuki ke atas hartanah tersebut bagi membolehkan Defendan Pertama mendapatkan pinjaman dan wang tersebut.

[20] Dari keterangan yang dikemukakan oleh Plaintif-Plaintif dan diakui oleh Defendan Pertama saya mendapati memang terdapat keterangan bahawa perjanjian jual beli ini telah dimasuki semasa terdapatnya hubungan kekasih antara Plaintif Pertama dan Defendan Pertama. Malah dari keterangan oleh Defendan Pertama sendiri pada masa itu Plaintif Pertama menyewa bilik di rumah Defendan Pertama. Hubungan antara Plaintif Pertama dan Defendan Pertama diketahui oleh keluarga Plaintif-Plaintif dan keluarga Defendan Pertama.

[21] Saya juga menerima keterangan Plaintif-Plaintif bahawa pada masa tersebut tiada dari kalangan keluarga Plaintif-Plaintif yang layak untuk mendapatkan pinjaman bank untuk mendapatkan wang bagi memulakan perniagaan dobi mereka. Tiada juga dari kalangan keluarga Plaintif-Plaintif yang layak untuk mendapatkan pinjaman bagi pembiayaan semula hartanah tersebut. Menurut Plaintif Pertama, ibu-bapanya telah berusia tua manakala Plaintif Pertama sendiri adalah penduduk tetap dimana polisi bank masa tersebut telah bertukar dengan hanya membenarkan pinjaman dibuat oleh warganegara sahaja. Terdapat juga ahli keluarga lain yang mempunyai komitmen kewangan lain sehingga menyebabkan tidak boleh mendapatkan pinjaman bank. Dalam situasi ini, adalah munasabah untuk Plaintif-Plaintif beralih kepada Defendan Pertama yang pada masa itu adalah kekasih Plaintif Pertama. Justeru, dalam situasi ini, tidak hairanlah aturan dan persetujuan seperti yang dinyatakan oleh Plaintif Pertama telah mengambil tempat.

[22] Hubungan kekasih bukanlah satu-satunya pembuktian yang dikemukakan oleh Plaintif-Plaintif. Di dalam kes ini, Defendan Pertama tidak menafikan bahawa ibu-bapa Plaintif-Plaintif telah menduduki hartanah tersebut selepas Perjanjian Jual Beli itu dimasuki sehinggalah mereka dihalau oleh Defendan Kedua. Disamping itu saya juga mendapati terdapat keterangan yang cukup bahawa Plaintif-Plaintif dan keluarganya adalah orang yang telah membayar ansuran-ansuran bulanan pinjaman bank Defendan Pertama. Ini juga diakui oleh Defendan Pertama. Cuma, di dalam kes ini Defendan Pertama mengatakan bahawa ia adalah bayaran sewa dan bukannya bayaran ansuran bulanan pinjaman tersebut. Bayaran ansuran yang telah dibuat oleh Plaintif-Plaintif dan keluarganya adalah selama 15 tahun sebanyak RM700.00 sebulan. Ia bukanlah satu jangkamasa yang pendek tetapi memakan masa sehingga 15 tahun.

Dakwaan Defendan Pertama bahawa ia sebenarnya adalah bayaran sewa adalah dakwaan yang tidak disokong oleh apa-apa bukti. Di dalam kes ini tidak terdapat apa-apa keterangan dokumen yang menunjukkan bahawa Plaintif-Plaintif dan keluarganya telah memasuki satu perjanjian sewaan dengan Defendan Pertama. Ia

hanyalah pengataan Defendan Pertama semata-mata. Selama tempoh 15 tahun tersebut, tiada satu catatan yang menyokong dakwaan Defendan Pertama itu. Malah keterangan-keterangan yang ada menyokong keterangan-keterangan Plaintif-Plaintif.

[23] Plaintif-Plaintif telah mengemukakan slip-slip bayaran ansuran hartanah tersebut dan ia telah ditandakan sebagai P2(1) hingga P2(46). Pengemukaan slip-slip bayaran ansuran ini tidak dapat dinafikan oleh Defendan Pertama. Pengemukaan slip-slip bayaran ansuran ini menujukkan Plaintif-Plaintif terhadap hartanah tersebut.

The Statement Of Claim

[19] I move on to consider the pleadings. The obvious starting point is the manner in which the plaintiffs had pleaded their case to show the creation of the purported trust. This may be gleaned from paras. [7], [8], [9], [10], [11] and [25] of the statement of claim ("the SOC") which are relied upon by the plaintiffs as giving rise to the alleged trust and they read as follows:

[7] In or about the year 1999, the Plaintiffs and/or the Plaintiff's family members had then intended to raise some monies to be utilised as capital for the Plaintiffs' family members had then intended to raise some monies to be utilised as capital for the Plaintiffs' family's new business venture by way of the refinancing the said Property with a local financial institution.

[8] However, due to the Plaintiffs' ineligibility to secure a loan facility from any local financial institutions to refinance the said Property, the Plaintiffs then suggested that the monies and/or capital for the aforementioned Plaintiffs' family's new business venture be raised by way of transferring the said Property to the 1st Defendant *via* a purported Sale and Purchase Agreement to obtain a loan facility under the name of the 1st Defendant, who at the material time was the girlfriend of the 1st Plaintiff, as there was no other eligible person in the Plaintiffs' family to do so.

[9] Under this arrangement, it was orally agreed between the Plaintiffs and the 1st Defendant that, notwithstanding the transfer of the said Property to the 1st Defendant by the Plaintiffs *via* a purported Sale and Purchase Agreement, the 1st Defendant shall continue to hold the said Property on trust for the benefit of the Plaintiffs and/or the Plaintiffs' family (hereinafter referred to as "the said Transfer Arrangement").

[10] Under the said Transfer Arrangement, it was also agreed between the Plaintiffs and the 1st Defendant that the total loan amount procured by the 1st Defendant from the said Transfer Arrangement shall be forwarded and conveyed to the Plaintiffs and in turn, the Plaintiffs and/or the Plaintiffs' family members will undertake the repayment of the total loan amount and the interests thereof in accordance with the terms and conditions of the loan facility agreement to be entered into between the 1st Defendant and the financial institution.

[11] Pursuant to the aforementioned oral agreement and/or the said Transfer Arrangement between the Plaintiffs and the 1st Defendant, the said Property was subsequently transferred by the Plaintiffs to the 1st Defendant through a Sale and Purchase Agreement whereby the 1st Defendant had thereafter, on behalf of the Plaintiffs, successfully obtained a loan sum of approximately RM90,000.00 (hereinafter referred to as "the said Loan Sum") from one Oriental Bank Berhad, which was later known as EON Bank Berhad and now currently known as Hong Leong Bank Berhad, D2 herein, after a merger and acquisition exercise.

[25] At all material times, the 1St Defendant very well knew that the said Property was conveyed into her name merely for the sake of convenience and appearance in accordance with the said Transfer Arrangement whereby the 1st Defendant was to only hold the said Property on trust for the benefit of the Plaintiffs.

SCJ's Orders

[20] At the end of the trial, the SCJ ruled in favour of the plaintiffs and was satisfied that D1 held the property on "trust" for the plaintiffs.

[21] The SCJ made the following orders:

(a) satu deklarasi bahawa Defendan Pertama hanya memegang Hartanah tersebut atas amanah (`merely hold on trust') sama rata;

(b) satu deklarasi bahawa Defendan Pertama memegang Jumlah Lebihan tersebut, yang merupakan hasil dari pelelongan dan/atau jualan Hartanah tersebut oleh Defendan Kedua kepada satu pihak ketiga, atas amanah untuk Plaintif-Plaintif dalam bahagian sama rata;

(c) satu deklarasi bahawa plaintif Pertama dan Plaintif Kedua adalah berhak kepada setengah bahagian masing-masing dalam Jumlah Lebihan tersebut;

(d) satu perintah untuk satu injunksi untuk menghalang ('to restrain') Defendan Pertama secara sendiri dan/atau pekerja-pekerjanya dan/atau agen-agennya walau apa jua dari mengambil dan/atau melaksanakan dokumen-dokumen relevan untuk tujuan mengambil Jumlah Lebihan tersebut dari Defendan Kedua dan/atau Pejabat Cawangan Defendan Kedua di bawah No. Akaun 0061400004878 dan/atau mana-mana No. Akaun lain yang berkenaan dengannya semata-mata untuk manfaatnya sendiri;

(e) satu perintah untuk satu injunksi untuk menghalang Defendan Kedua dan/atau Pejabat Cawangan Defendan Kedua, secara sendiri dan/atau pekerja-pekerjanya dan/atau agen-agennya walau apa jua dari melepaskan Jumlah Lebihan tersebut di bawah No. Akaun 00614000004878 dan/atau mana-mana No. Akaun lain yang berkenaan dengannya kepada Defendan Pertama semata-mata untuk manfaatnya sendiri;

A (f) satu perintah bahawa Jumlah Lebihan tersebut di bawah No. Akaun 00614000004878 dan/atau mana-mana No. Akaun lain yang berkenaan dengannya yang dipegang oleh Defendan Kedua dan/atau Pejabat Cawangan Defendan Kedua dilepaskan dan/atau dipindah milik serta-merta kepada Plaintif-plaintif dengan sewajarnya;

B (g) satu perintah bahawa faedah hendaklah dilevikan dan dikenakan ke atas Jumlah Lebihan tersebut pada kadar 5% setahun yang harus dibayar oleh Defendan-defendan kepada Plaintif-plaintif dari tarikh penghakiman sehingga tarikh pelepasan penuh Jumlah Lebihan tersebut oleh Defendan Kedua kepada Plaintif-plaintif atau
C pemindahan milik Jumlah Lebihan tersebut oleh Defendan Pertama kepada Plaintif-plaintif, yang mana berkenaan;

(h) satu perintah bahawa faedah dikenakan ke atas kos yang diberi oleh Mahkamah Yang Mulia ini pada kadar 5% setahun yang hendaklah dibayar oleh Defendan Pertama kepada plaintif-plaintif dari tarikh
D penghakiman sehingga tarikh pembayaran penuh kos yang diberi;

(i) satu perintah bahawa Defendan Pertama membayar kos sebanyak Ringgit Malaysia Dua Puluh Lima Ribu (RM25,000.00) kepada Plaintif-plaintif sebagai kos tindakan ini;

(j) satu perintah bahawa tuntutan kos oleh Plaintif-plaintif terhadap
E Defendan Kedua adalah ditanggung oleh parti-parti masing-masing; dan

(k) satu perintah bahawa Tuntutan Balas Defendan Pertama terhadap Plaintif-plaintif adalah ditolak secara keseluruhannya dengan kos.

[22] Thus, the surplus sum was ordered to be released to the plaintiffs. Dl's
F defence was that she purchased the property pursuant to the impugned SPA. Significantly, DI did not plead that the impugned SPA was an illegal agreement or a sham agreement.

Memorandum Of Appeal

G **[23]** However, in the memorandum of appeal, D1 has raised the issue of illegality and that the impugned SPA is a sham sale and purchase agreement. The relevant parts of the memorandum of appeal read as:

2. The learned Sessions Court Judge had erred in law and/or facts in failing to appreciate that the Statement of Claim especially
H paragraphs 8, 9, 10. 11 and 25 are grounded on issues that are *ex-facie* illegal and/or against Public Policy.

3. The learned Sessions Court Judge had erred in law and/or facts in failing to consider that the Respondent needed to rely on the illegal Sale and Purchase Agreement dated 30/06/1999 in presenting their
I claim in court.

4. The learned Sessions Court Judge had erred in law and/or facts in failing to appreciate that the Sale and Purchase Agreement dated 30/06/1999 is a sham transaction and void pursuant to Section 24(e) of the Contract Act 1950.

5. The learned Sessions Court Judge had erred in law and/or facts in providing reliefs to the Respondents on the Sale and Purchase dated 30/06/1999 which is void.

6. The learned Sessions Court Judge had erred in law and/or facts in failing to appreciate the evidence of the First Respondent as stated in paragraph 21 of the Ground of the judgment as follows "manakala Plaintif Pertama sendiri adalah penduduk tetap dimana polisi bank pada masa tersebut telah bertukar dengan hanya membenarkan pinjaman dibuat oleh warganegara sahaja".

7. The learned Sessions Court Judge had erred in law and/or facts to appreciate that the purpose of the Respondents entering into the Sale and Purchase Agreement dated 30/06/1999 was to circumvent the Second Defendant Bank's policy in not providing loan to non citizen and deceive the Second Defendant into believing that the Sale and Purchase Agreement dated 30/06/1999 is a genuine transaction for purpose of obtaining the loan.

8. The learned Sessions Court Judge had erred in law and/or facts in failing to dismiss the claim of the Respondents *in limine* based on the pleaded facts in the Statement of Claim.

Issues On Appeal

[24] This appeal therefore raises the following issues:

(i) whether the plaintiffs are entitled in law to rely upon a sale and purchase agreement as an instrument giving rise to a trust where it has been expressly pleaded in the statement of claim that the sale and purchase agreement was a "purported sale and purchase agreement" and created "merely for the sake of convenience and appearance";

(ii) whether a sale and purchase agreement which is expressed to be a "purported sale and purchase agreement" and "merely for the sake of convenience and appearance" is in law, a sham agreement;

(iii) whether the impugned SPA which was created "merely for the sake of convenience and appearance" and intended to create the appearance that it is a genuine sale and purchase agreement in order to circumvent a financial institution's internal lending policy of not granting loan facilities to non-citizens, is illegal as being contrary to public policy as per s. 24(e) of the Contracts Act 1950; and

(iv) whether D1 who had not pleaded that the impugned SPA is a "sham agreement" but had taken the position in the court below that the impugned SPA is genuine and that she is a genuine purchaser, may on appeal contend that the property which was transferred to her pursuant to the impugned SPA, passes to her and she is therefore entitled to any monetary benefit that accrues or flows as a result of such transfer of property.

The Arguments

[25] It was emphasised for D1 that for the purpose of launching this suit, the plaintiffs never recognised the impugned SPA as a true and genuine agreement. In the SOC, the plaintiffs pleaded that the impugned SPA is a "purported" agreement and the word "purport" means to "claim falsely". The other terminologies associated with this word are "facade" or "sham".

[26] Counsel for D1 underscored this point by referring to para. 25 of the SOC where it was stated that the impugned SPA was entered into for the sake of "appearance". Hence, counsel for D1 posed the rhetorical question – for the sake of appearance to whom and what was the purpose of the camouflage? Counsel answered this by referring to P1's testimony where he said that the impugned SPA was never intended as a true sale and purchase agreement (see: Q & A No. 6, No. 9 at pp. 387-388 of AR, Jilid 2 (2/2) and also P1's re-examination at line 32, p. 173 and line 14, p. 174, AR Jilid 2 (1/2). P1 testified that the real reason that the impugned SPA was entered into was to get D2 to approve and release a loan amount which P1 could not obtain by himself. And this was because P1 was a foreigner holding a red national registration identity card ("NRIC") (see: line 32 p. 136, AR Jilid 2 (1/2). P1 knew that the banks and financial institutions especially D2 had a policy against giving loans to non-citizens. And the impugned SPA was to circumvent these obstacles.

[27] Thus the impugned SPA was created to give D2 an appearance that the agreement was a true and genuine agreement when according to P1, it was not and never intended to be. The SCJ alluded to this fact at para. 21 of the grounds of judgment where she said:

> ... Manakala Plaintif pertama sendiri adalah penduduk tetap dimana polisi bank pada masa tersebut telah bertukar dengan hanya membenarkan pinjaman dibuat oleh warganegara sahaja" ... Justeru, dalam situasi ini, tidak hairanlah aturan dan persetujuan seperti yang dinyatakan oleh Plaintif Pertama telah mengambil tempat.

[28] According to D1, the trial judge had failed to appreciate that the SOC and the evidence in support of the claim especially by P1 reeked of illegality and/or that the impugned SPA was against public policy. It was argued that the impugned SPA which is said to create the trust amounts to illegality and against public policy and was therefore caught by s. 24(e) of the Contracts

Act 1950. It was argued for D1 that the purpose and object of the impugned SPA was to give D2 an appearance that it was a true and genuine sale of property by the plaintiffs to D1 in order for D2 to process the loan application favourably. Hence, counsel for D1 submitted that as stated in the SOC and in the evidence, as far as the plaintiffs were concerned, the impugned SPA was a facade and not a true SPA. However, in the eyes of D2 and to their knowledge and understanding, the impugned SPA was a true and genuine sale and purchase agreement for purposes of the loan application.

[29] Counsel for D1 said that if D2 had been informed or was aware that the impugned SPA was in fact an arrangement for the sake of appearance only, then D2 or for that matter, any financial institution will not process and approve any loan. Counsel for D1 said that the plaintiffs cannot take advantage of their own dishonesty and make a claim for the surplus sum on the basis of an alleged trust as the edifice of the trust is a sham agreement.

[30] In support of his argument, counsel referred to the case of *Tinker v. Tinker* [1970] 1 All ER 540 where Lord Denning MR in dealing with a case where the husband had put a property in the wife's name to avoid being taken by creditors later in case his business failed, said at p. 541, para. (g):

> So, it is plain that the husband had the house put into his wife's name so as to avoid any risk of it being taken by his creditors in case his business was not a success. What is the result in law? In *Gascoigne v. Gascoigne* it was held that , when a husband put a house in his wife's name so as to avoid it being taken by creditors, the house belonged to the wife. The husband could not be heard to say that it belonged to him, because he could not be allowed to take advantage of his own dishonesty.

[31] Further, at p. 542, para. (c), the Master of the Rolls said:

> He cannot say that the house is his own and, at one and the same time, say that it is his wife's. As against his wife, he wants to say that it belongs to him. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely, or it was conveyed to her as trustee for her husband. It must be one or other.

[32] Thus, based on the principles that were enunciated in *Tinker v. Tinker*, counsel for DI submitted that a transaction or agreement is either genuine or sham. He said that it would not make sense if a transaction can be a sham for one purpose but not for another. Counsel argued that the impugned SPA cannot be said to be a purported sham sale and purchase agreement as between D1 and the plaintiffs and at the same time, a true and genuine sale and purchase agreement as between D1 and D2.

[33] Counsel said that the plaintiffs cannot benefit from their own acts of dishonesty in using a sham agreement to obtain a loan from D2 by using Dl's name as the purported "purchaser" and "borrower". Counsel referred to *Tinker v. Tinker*, where Lord Salmon LJ, said at p. 543, para. (e),

> It is trite law that anyone coming to equity to be relieved against his own act must come with clean hands. If, in a case such as the present, he were to put forward , as a reason for being relieved against his own act, a dishonest plot on his part, e.g to defraud his creditors, the court would refuse him relief and would say: "Let the estate lie where it falls."

[34] Counsel for D1 therefore submitted that the dishonest plot in the present case may be culled from the SOC and the evidence of P1. He said the plaintiffs are relying on their dishonesty in making their claim and in doing so ran afoul of the principle of illegality and public policy that the courts will not lend its aid to plaintiffs whose pleaded case disclose illegality and is reliant on illegality. Counsel to D1 took the point that the SCJ ought to have appreciated that the plaintiffs are relying on a sham agreement to show the existence of a trust. Thus, counsel for D1 contended that the plaintiffs' case is that D1 had become a purported trustee by virtue of a sham agreement. It was accordingly emphasised that this is self-evidently illegal and goes against public policy. According to counsel, it can be brought to the attention of this Court of Appeal whether or not it is pleaded or brought up at the trial. Counsel said that it is the duty of the courts to be vigilant with regards to matters of this nature, whether pleaded or not.

[35] According to counsel for D1, the plaintiffs' conduct in expressly asserting that the impugned SPA is a "purported" sale and purchase agreement *vis-a-vis* D1 and implicitly implying that it is a valid agreement for purposes of D2's loan, is conduct which shows "approbation and reprobation" and fits neatly into Lord Scrutton Lys description in *Verschures Creameries Limited v. Hull and Netherlands Steamship Company, Ltd* [1921] 2 KB 608 in a passage that reads at p. 612:

> A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

[36] Thus, counsel for D1 said that "blowing hot and cold" is another description of "approbating and reprobating" and is not permitted in law. The passage in Lord Scrutton Lys judgment quoted above has been approved by the Malaysian Court of Appeal in a decision in *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* [2017] 6 CLJ 368; [2017] MLJU 275, para. [22].

[37] As for the complaint that the issue of illegality or sham agreement was not pleaded or that D1 had taken the stand during the trial that this was a genuine SPA, counsel for D1 made reference to the decision of the Privy Council ("PC") in *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd Anor* [1989] 1 897; [1989] 1 CLJ (Rep) 1; [1989] 1 MLJ 457, where the PC said:

> It is well established as a general principle that the illegality of an agreement sued upon is a matter of which the court is obliged, once it is apprised of facts tending to support the suggestion, to take notice e*x proprio motu* and even though not pleaded for clearly, no court could knowingly be party to the enforcement of an unlawful agreement.

[38] Counsel for D1 also relied on the Court of Appeal's decision in *China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd* [2014] 7 CLJ 644; [2014] 5 MLJ 1 at para. [2] which reads as:

> At the outset we must say that the *trial courts must be vigilant not to provide any relief on contracts which is void on the grounds of public policy, or illegality ..., whether or not it is the pleaded case of the parties or whether the issue was raised during the trial.* (emphasis added)

[39] The next case that was referred to was *John Ambrose v. Peter Anthony & Anor* [2017] 6 CLJ 465 where the Court of Appeal upheld the trial judge's decision to dismiss the plaintiff's claim. In that case, illegality was not pleaded. It was brought up by the trial judge on his own volition during submissions and parties were asked to address the point. The plaintiff's claim was for agreed commissions and monthly payments which were to be paid to him for securing two construction contracts. The plaintiff in that case was essentially a "lobbyist" and he used his political connections and networking to secure the two contracts. This was held to be contrary to public policy and offended s. 24(e) of the Contracts Act 1950. In reaching its decision, the Court of Appeal relied on the principles that were enunciated in an earlier decision by the Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212 FC.

[40] The Court of Appeal's decision is encapsulated in the following passages of the judgment (at p. 478) which read as:

> [40] The principles that can be gleaned from *Merong Mahawangsa* are as follows:
>
> (1) no court ought to enforce an illegal contract where the contract is *ex facie* illegal, **even if illegality was not pleaded;**
>
> (2) where the contract is not *ex facie* illegal and illegality was not pleaded, **the court can still take judicial notice of illegality when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality;**
>
> (3) the court is bound to intervene if illegality is brought to its notice; and
>
> (4) such **judicial notice can be taken at any stage, either at the court of first instance or at the appellate stage.**
>
> [41] In our view, the most pertinent principle encapsulated in *Merong Mahawangsa* is that ***the courts*** **are bound at all stages to take notice of illegality, whether *ex facie* or which later appears, even though not pleaded,** and that it was contrary to public policy that a person

A should be hired for money or valuable consideration, to use his position and interest to procure a benefit from the Government. (emphasis added)

[41] Therefore, counsel for D1 submitted that the question of whether D1 is a trustee for the plaintiffs does not arise and that the SCJ ought to B have dismissed the claim *in limine*. It was therefore submitted for D1 that the surplus sum therefore belongs to D1 absolutely and on this score alone, Dl's appeal ought to be allowed.

[42] On the other hand, counsel for the plaintiffs made the point that this court should not interfere with the findings of fact that were made by the trial C judge and that the issue of illegality and sham agreement are all "afterthoughts" and should not be entertained, more so since these matters were not pleaded in the defence and not taken up in the court of first instance. According to counsel for the plaintiffs, illegality and/or sham agreement are "irrelevant" and the only question is whether there was a trust and that in D this regard, the SCJ had made a clear finding that D1 was holding the property on trust for the plaintiffs. As such, it was contended that the surplus sum belongs to the plaintiffs.

Analysis And Conclusion

E **[43]** The plaintiffs and D1 are now asserting rival claims over the surplus sum. The issue now is whether the plaintiffs are entitled to the surplus sum pursuant to the "trust" arrangement which they had with D1 or whether, as D1 now contends, the "estate should fall where it lies" as the plaintiffs are seeking to enforce a trust borne out of a sham/illegal agreement. Consequently, whether the surplus sum should be released to Dl.

F

[44] I start by observing that the factual narrative in the present case before me is strikingly similar to the facts of the case in *Suntoso Jacob v. Kong Miao Ming & Anor* [1986] 2 MLJ 170; [1986] SLR 59 CA Singapore ("*Suntoso Jacob*"). The facts in *Suntoso Jacob*'s case are as follows.

G **[45]** In that case, the appellant and respondent owned shares in a company incorporated in Singapore and had planned to purchase a tug-boat and have it registered with the Registrar of Ships, Singapore ("the Registrar"). The appellant (a foreigner) held 190,000 shares in the company, whereas the respondent (a local) held 10,000 shares. Thus, the H company would be deemed to be "foreign-owned". At the material time, under the administrative guidelines laid down by the Registrar, "foreign-owned" vessels would not be accepted for registration. In order to circumvent the guidelines, the appellant transferred 92,000 shares ("the transferred shares") to the respondent so as to deceive the Registrar into I believing that the vessel was not "foreign-owned". The deception worked and the vessel was registered. The respondent later refused to return the shares. The appellant therefore sought a declaration that the respondent was

not entitled to the transferred shares and that he was only holding the transferred shares on "trust" for the appellant. The court held that the appellant had practiced a deception on the public administration and had "soiled his hands" and could not expect the court to give effect to and enforce the trust in his favour. The outcome was obviously a "windfall" for the respondent. At p.174, the Singapore Court of Appeal enunciated the following principle:

> *To recover the property he has to rely on the trust created in his favour and in so doing the illegal purpose of the transfer that gave rise to the trust emerged. Even if the appellant is relying on the resulting trust of the said Shares by virtue of the transfer thereof to the respondent without any payment, the unlawful purpose of the transfer cannot be ignored. It is too artificial to sever the purpose from the transaction,* ie, the transfer of the said shares to the Respondent without any payment, and look at only the transaction in isolation and say that it was not tainted by the unlawful purpose. **The intention of the parties and the purpose of the transaction are clearly relevant.**
>
> Where a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end, the transaction is tainted with illegality and is unenforceable. In *Alexander v. Rayson* [1936] 1 KB 169 the Court of Appeal in England said:
>
> But it often happens that *an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose, that is to say a purpose that is illegal, immoral or contrary to public policy.*
>
> The most common instance of this is an agreement for the sale or letting of an object, where the agreement is unobjectionable on the face of it, but where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. *Ex turpi causa non oritur actio*. The action does not lie because the Court will not lend its help to such a plaintiff. Many instances of this are to be found in the books. (emphasis added)

[46] Thus the first question in this appeal is whether the impugned SPA between the plaintiffs (as so-called "vendors") and DI (as the so-called "purchaser") is a genuine SPA or whether it was a "sham agreement" which was meant to deceive D2 (the bank) into believing that it was giving a loan facility to a Malaysian citizen who was eligible for the loan as per D2's policies.

[47] Before I go any further, it is common ground that the plaintiff has pleaded the existence of a "trust" (para. 9 of the SOC), but, neither illegality nor the issue of the impugned SPA being a sham agreement was pleaded in the defence. Quite clearly one may see from the pleaded case of the plaintiffs that even the plaintiffs do not accept that it was a genuine SPA.

Rather, the plaintiffs have referred to the impugned SPA as a "purported SPA" (see: paras. 8 and 9 SOC).

[48] Further at para. 25 SOC, the plaintiffs say that the property was conveyed into the name of D1 for the "sake of convenience and appearance" in accordance with a "transfer arrangement" whereby D1 was to hold the property on "trust" for the plaintiffs.

[49] Indeed, even P1 had confirmed during his testimony that this was not a genuine SPA as it was a "formality just to apply for a loan" (see: p. 173 vol. 2 AR). P1's answers to questions in examination in chief (at pp. 387-388 AR vol. 2/2) are as follows:

Q6. Please refer to pages 29-37 of the Ikatan Dokumen Bersama. Can you please identify this document?

A6. Yes. This is the sale and purchase agreement which was entered into between me and the 2nd Plaintiff being the Vendor of the 1st Defendant, Cheong Huey Charn as the Purchaser on 30/06/1999. However, the sale and purchase agreement at all material times was only meant and intended for fulfilling formality requirements in respect of the transfer arrangement at that time between us and the 1st Defendant which was strictly to be on trust only since the Property was always intended for our family benefit and was never actually meant for any outright sale to the 1st Defendant.

Q8. What was the reason for you and the 1st Defendant to make plans and arrangements in order to transfer the Property to her at that material time?

A8. At that material time, my family members and I decided to collect a lump sum of money for the purpose of venturing into a new business for our family members. However, because of the non-eligibility of my family members, for instance, our parents' old age, the various financial commitments of our other family members and my non-citizen status, my brother who is the 2nd Plaintiff and I subsequently decided to refinance the Property by way of transferring the Property to the 1st Defendant in order to enable her to apply for a loan on our behalf.

For the said purpose, the 1st Defendant will try to apply a higher loan amount from a bank on our behalf in order to enable us to get the remaining sum of the approved loan upon the full settlement of the redemption sum of the Property to our old financier, Mayban Finance Berhad.

Q9. Since the 1st Defendant will be applying for a loan on your behalf and the 2nd Plaintiffs behalf as well, did you and the 2nd Plaintiff make any further arrangements or agreement between both of you and the 1st Defendant?

A9. Yes. For the transfer arrangement, I had personally told the 1st Defendant that my family and I will be responsible for the repayment of the monthly instalments upon the approval of her loan application. At the same time, I had also expressly informed the 1st Defendant that the transfer of the Property only means that she will be merely holding the Property on trust strictly for our family's benefit and in reality the Property was never effectively sold to the 1st Defendant at all

Q10. Can you elaborate further about the transfer arrangement between you in the 1st Defendant at that material time before she managed to get a loan?

A10. Before the 2nd Plaintiff and I transferred the Property to the 1st Defendant, I had personally told her that she has no rightful claim of ownership on the Property, but that she merely held the Property on trust for our family benefit. In addition, I had also told the 1st Defendant clearly that both my parents will continue to stay at the Property even after the registered owners' name in respect of the Property has been changed to the 1st Defendant's name and the loan application is approved.

[50] It is also significant that during re-examination, P1 said:

PC: Mr. Rama the defendant lawyer had asked you with regards to this page 31 relation to the QNA 6 (PWS1) that you had given. Is there any mention of there being any trust in this particular agreement?

And you have answered no right? Why is there no is mention of any trust in this particular agreement?

PW1: Because this SNP is a formality documents.

PC: Formality for what?

PW1: Just for to apply the loan.

PC: To apply loan, what's the reason for the loan?

PW1: To apply a loan to start a business somewhere like that. So here I had told the court all this SNP if you sign is it for formality sake only. Sake for formality just to apply loan. So here are that we had venture agreement with Cheong Huey Charn to help us to get a loan. (03:58:56).

[51] On the other hand, D1 maintained during the trial that this was a genuine SPA and that she "purchased" the property from the plaintiffs *via* the impugned SPA. She said that Mr Phang and Mdm Tan stayed in the property as "tenants". But there was no evidence of a tenancy. At any rate, the SCJ disbelieved Dl's evidence and instead accepted the version put forward by the plaintiffs. Hence, the learned SCJ who heard and saw the witnesses preferred the evidence of the plaintiff and rejected the evidence of D1. These findings are to be found in paras. 24 to 38 of the GOJ and I do not intend to reproduce them in this judgment. But it would suffice to say

that the evidence does not support Dl's contention that she was the real owner of the property or that she had "purchased" the property, as all indications were that it was the plaintiffs who serviced the loan that was granted by D2 and took all the necessary steps to prevent the first auction from being carried out.

[52] Quite clearly, the payments of RM700 per month into Dl's loan account with D2 from 1999 to 2014, was evidence of the loan repayments as per the transfer arrangement between the plaintiffs and D1. These were not rental payments which were channelled into D1's loan account.

[53] Despite servicing the loan for several years, and paying a sum of RM10,200 to get D2 to call off the auction in March 2014, the plaintiffs were not able to prevent the second auction which was scheduled to be held on 17 December 2014 to be called off. No doubt, after the romantic relationship between P1 and D1 ended around 2001, P1 attempted to get D1 to give a power of attorney but D1 refused to do so. D1's conduct in refusing to give a power of attorney, does not of itself, support Dl's theory that she was genuinely the owner of the property and not just a trustee of the property. At any rate, I see no reason why the findings of fact by the learned SCJ that D1 was holding the property on "trust", should be disturbed.

[54] Indeed, looking at the GOJ as a whole, I would say that the learned SCJ had meticulously scrutinised the evidence and correctly concluded based on the body of evidence that was presented that there was no tenancy and there was in fact a trust arrangement. In this regard, the SCJ had correctly alluded to the fact that parties had come up with the impugned SPA as the plaintiffs or at least P1, being a permanent resident of Malaysia, was not eligible to apply for a bank loan.

[55] The only mistake that the SCJ made in terms of her findings of fact, if at all, was in para. [21] of the GOJ where she said that the loan was to enable the plaintiffs' family to start a laundry business. But this does not alter the outcome of the SCJ's findings with respect to the existence of a "trust".

[56] The SCJ's finding that the loan was applied to enable the plaintiffs' family to start the laundry business is obviously against the weight of evidence because P1 had testified that he did not receive a single cent from the loan as the bulk of it was used to settle the redemption sum of RM63,435.18 (as at 18 August 1999) with Maybank Finance Berhad and the balance sum was taken by Dl. D1 maintains that P1 had borrowed various sums of money from her and that the property was "sold" to D1 *via* the impugned SPA in order for P1 to settle his debts with D1. But the SCJ did not believe D1's version.

[57] D1 alleged that there was no trust arrangement and that the payments by the plaintiffs and the occupation of the property by the elder Mr Phang and his wife Mdm Tan was part of a tenancy arrangement and that the payment of RM700 into Dl's loan account with D2 was an arrangement whereby the rental proceeds would be paid into D1's loan account. As such, over the years from 1999 until about 2014 when the loan became an NPL, payments were made into D1's loan account. There is absolutely no evidence that D1 paid any monies into the loan account. Payment was always made by the plaintiffs or their family members. As I said, there is no evidence of any "tenancy" between D1 and the plaintiffs or their parents.

[58] The SCJ found as a fact that after the loan became NPL, P1 made payment of RM10,200 into D1's loan account after speaking to D2's staff, Mr Tan Kean Seng (PW3). PW3 denied speaking to P1 or his family. The SCJ allowed an application for PW3 to be treated as a "hostile witness". Counsel for D1 says that there was no basis for PW3 to be treated as a hostile witness and that the witness has not given an earlier statement which was inconsistent with his evidence in court. It is just that PW3's evidence did not favour the plaintiffs' narrative of the case. And so counsel submitted that the plaintiffs are stuck with PW3's evidence. It may well be that PW3 was wrongly treated as hostile witness, but I do think that it was entirely up to the SCJ to decide, whether to accept or reject PW3's evidence and whether to believe or disbelieve him. Here, I do not find any error in the SCJ's rejection of PW3's evidence when he said that he did not meet P1 or his family members and gave them information that RM10,200 had to be paid into D1's loan account in order for D2 to call off the first auction on 28 March 2014. It is more likely that PW3 did speak to P1 or his family members and that is why P1 made the arrangement to pay RM10,200 into D1's loan account so as to save the property from being auctioned off.

[59] As such, save for the SCJ's error in para. [21] of the GOJ where she concluded that the plaintiffs were not eligible to apply for the loan "to start the laundry business", I am inclined to the view that the rest of the findings of fact that were made by the SCJ, are not erroneous.

[60] In this regard, it is instructive to have regard to the principle that was enunciated by the Court of Appeal in *Philip Bell Booth & Anor. v. Navaratnam Narayanan* [2016] 9 CLJ 37, where it was held:

> [12] It is settled law that an appellate court should not intervene with a trial court decision unless the decision is premised on a wrong application of a principle of law or the decision is clearly unsupported by the evidence before the court.

[61] Looking at the pleadings (the SOC) and P1's evidence, I have no doubts that there was a trust arrangement whereby D1 was to hold the property "on trust" for the plaintiffs and their family. I will add the fact that D1 refused to give a power of attorney when P1's relationship with D1 was terminated does not support the suggestion that D1 was a "purchaser" under the impugned SPA. Indeed, D1's entire lack of response to the fact that the loan had become an NPL and that D2 was taking steps to enforce the charge over the property suggest very convincingly that D1 was not the purchaser and was merely a "borrower on paper". Thus, the SCJ's finding that there was a trust arrangement is quite clearly supported by cogent and convincing evidence.

[62] I turn now to the issue of a "sham" agreement. In my view, despite the fact that the issue of "sham agreement" or illegality was not pleaded, there is to my mind sufficient admission or tacit acknowledgment in the SOC and per P1's evidence, to conclude that the impugned SPA was not a genuine SPA. It was quite obviously a facade and in reality D1 was not a "purchaser" of the property.

[63] But insofar as D2 was concerned, D1 was the borrower. But that was only on "paper". In reality, the borrowers were the plaintiffs. D1 merely lent her name and may at best, have benefited by taking a small portion of the proceeds of loan. Of course, D1 claims to have made various payments towards legal fees *vis-a-vis* the impugned SPA but the evidence on this is somewhat scanty. Be that as it may, the bottom line is whether the plaintiffs can rely on the impugned SPA to assert the existence of a trust and claim the surplus sum of RM431,201.11 as the beneficial owners of the property. Of course, this issue was not pleaded in the defence and the point was missed all round when the matter was alive in the court below. Indeed, in the court below, D1's case is that the impugned SPA was a genuine SPA. On appeal, D1 maintains that the impugned SPA is a sham and a camouflage to deceive D2 and in this regard, D1 points to the SOC and P1's evidence.

[64] Thus, D1 is now taking the path of least resistance and has, in the present appeal, raised the issue of sham agreement and illegality. In his submissions, counsel for D1 took the position that the impugned SPA became a sham when the suit was filed in February 2016. I do not understand how that can be so. If it was a sham, then it was a sham and was illegal *ab initio*. I will leave the point alone as it does not call for any discussion. I have just mentioned it for completeness.

[65] The real and only question is whether the plaintiffs are entitled as a matter of law and/or equity to enforce or claim a benefit under a trust, when the edifice of the trust is a sham/illegal agreement, namely the impugned SPA.

[66] Quite clearly, based on the SOC and P1's evidence, the impugned SPA is a sham agreement. It was a facade to deceive D2 into thinking that D1 was a real purchaser, when in fact there was no sale. It was a trust arrangement.

[67] Based on the principle that was enunciated in *Suntoso Jacob*'s case, I do not see how the plaintiffs here can be allowed to seek the assistance of the court because if this court were to enforce the trust, then it would mean that a court of law is being asked to enforce a trust borne out of a sham agreement/illegal and in circumstances where the plaintiffs have "soiled their hands". The question to be asked is whether this case is any different from the position which obtained in *Suntoso Jacob* where the outcome was, "let the estate (shares) fall where it lies". In that case, the respondent did not pay any consideration for the 92,000 shares which were transferred to him by the appellant. The transfer was done in order to deceive the Registrar that the company which was buying the tug-boat was not foreign owned. In that case, the deception was done in order to overcome the Registrar's "administrative guidelines", whereas here the parties entered into the impugned SPA to circumvent the bank's internal policy of not granting loan facilities to non-citizens.

[68] The impugned SPA in the present case, is an agreement which in my view, offends s. 24(e) of the Contracts Act 1950. In the ultimate analysis, I find that this case is no different from *Suntoso Jacob*'s case. Of course, illegality or sham agreement was not pleaded by D1, but based on the jurisprudence emanating from the decisions of the Court of Appeal and Federal Court, regardless of the stage at which the case is progressing, once a trial court or appellate court is apprised of the matter, then it cannot be ignored.

[69] No doubt, to dismiss the plaintiffs' claim based on illegality or that the impugned SPA is a sham agreement and/or that it is against public policy under s. 24(e) of the Contracts Act 1950, will lead to an unfair outcome in that D1 will get a 'windfall', but that is the inevitable consequence when issues of illegality or sham agreement are raised and accepted by the court.

[70] The other nagging point is with regard to the passing of title to the property to D1. In this case, there is no doubt that the title to the property has passed to D1 under a sham SPA or illegal contract but according to the case of *Mustafa Osman v. Lee Chua* [1996] 3 CLJ 494 CA ("*Mustafa Osman*") property can pass under an illegal contract which has been "executed", as in this case. The facts of that case were as follows. The plaintiff was the proprietor of a piece of land and the house that stood on it.

[71] The land was governed by s. 108 of the National Land Code (Penang and Malacca) Titles Act 1963, with the result that it could not be transferred, leased, transmitted or charged to any person other than a Malay. Despite the statutory prohibition, and in clear violation thereof,

A the plaintiff assigned the premises to the defendant for a sum of RM10,000 and let that portion of the land on which the house stood for RM15 a month. The plaintiff subsequently sought to evict the defendant from the land, and in consequence, initiated proceedings for vacant possession of the same. The plaintiff based his claim on the tenancy agreement, arguing B in the High Court that the defendant had breached the terms of the agreement. The learned Judicial Commissioner, reversing the learned Magistrate, found the tenancy agreement to be illegal, and on that ground ruled the claim unsustainable. The plaintiff appealed, and contended that the effect of the Judicial Commissioner's decision was to permit the C occupation of land by one who is disabled by statute from having possession. His Lordship Gopal Sri Ram JCA speaking for the Court of Appeal held that the tenancy agreement was clearly caught by the prohibition in s. 108 and it is illegal and void *ab initio*. According to the Court of Appeal, illegality, however, need not be specifically pleaded, and once it is brought to the attention of the court, the court, upon being D satisfied that the transaction is indeed illegal, is obliged to act upon it.

[72] Relevantly, the Court of Appeal enunciated (at pp. 500-501 of the judgment) that "property in chattels and land can pass under an illegal, and therefore unenforceable, contract (see: *Tinsley v. Milligan* [1993] 3 All ER 65 E at 86). Consequently, the outcome in *Mustafa Osman*'s case was that the property in the house having passed to the defendant, and he having been put in occupation of the land, "the loss should lie where it has fallen". The situation in the present case is no different. And following the principle that was enunciated in the *Mustafa Osman* case, the title to the property has in my view, passed to D1 under an "executed" contract, *albeit* that it is a "sham F agreement".

[73] The next point which I will deal with is the fact that illegality or sham agreement was not pleaded nor advanced during the trial. Counsel for the plaintiffs said that this is an "afterthought". Conceptually, if the impugned G SPA was a sham agreement then it was a sham agreement right from the beginning. The fact that the point was not raised in the court below merely shows that the issue escaped the attention of those having conduct of the case in the court below. But on appeal, counsel for D1 (who was not counsel who handled the trial) has now very properly brought the matter up by way of the memorandum of appeal and by way of argument before me. It is a point H which plainly calls for no further evidence. The evidence in fact supports the conclusion that it is a sham sale and purchase agreement.

[74] Hence, since the plaintiffs' claim is based on a "transfer arrangement" or "trust" (the label being immaterial) which arises under a sham sale and I purchase agreement, I am compelled as a matter of law, to allow D1's appeal on the narrow ground that the court will not assist plaintiffs in enforcing a "transfer arrangement" or "trust" which is borne out of a sham agreement or illegal agreement.

Outcome

[75] For the reasons as articulated above, D1's appeal is therefore allowed. Consequently, the order of the SCJ dated 27 October 2016 is set-aside in its entirety. Ordinarily, D1 will be entitled to costs here and below. But, in as much as D1 was a party to a sham/illegal agreement, I do not think that D1 should be rewarded with any costs. As such, I make no order as to costs. The deposit is refunded to D1 (appellant).

Preserving The Surplus Sum

[76] Counsel for the plaintiffs then indicated that his clients would be filing an appeal to the Court of Appeal and moved this court *via* an oral application, that pending disposal of plaintiffs' appeal to the Court of Appeal, that the "surplus sum" be kept intact with D2 ie, that prayers (d), (e) and (f) be resurrected and granted pending appeal.

[77] Essentially, counsel was seeking for a preservation order such that D2 would keep the surplus sum pending disposal of the plaintiffs' appeal.

[78] However, Mr Paari Perumal, counsel for D1 objected to any preservation order. He said that there has been a finding that this is an illegal sale and purchase agreement and a sham agreement and if a stay or any interim preservation is allowed, it will be tainted with illegality. He rounded off by saying that the court should not assist the plaintiffs in any form or shape.

[79] In response, Mr Ronnie Yoon, said that the court has discretionary power to grant a preservation order and that the surplus sum will be "safe" in D2's account which is in Dl's name. He pointed to the fact that Dl's counsel has already said they will act quickly to release the money. He said that, if the surplus sum is released into the hands of D1, then the plaintiffs' appeal to the Court of Appeal may be rendered nugatory. Counsel for the plaintiffs said that there will be no prejudice to D1 pending outcome of the plaintiffs' appeal to the Court of Appeal.

[80] Having heard counsel on the matter, my ruling was as follows. As I said in my grounds of judgment earlier, that the outcome is unfair because the real borrowers were the plaintiffs (and their family). They serviced the loan, *albeit* that it was in D1's name. But that was part of the "sham" arrangement which manifested itself in the form of the impugned SPA.

[81] I do not think that it would be fair or appropriate for the surplus sum to be released to D1 whilst the correctness of my decision is being tested in the Court of Appeal. Indeed, pending disposal of the appeal before me, D1 obtained a stay of the order dated 27 October 2016 so that the surplus sum would remain with D2. Now that the appeal was decided in favour of D1,

I take the view that as a matter of fairness and justice, the surplus sum of RM431,201.11 should continue to remain with D2 pending disposal of the plaintiffs' appeal to the Court of Appeal. However, this order will lapse if a notice of appeal is not filed/served within seven days from today ie, on or before 14 August 2017.

[82] I therefore granted a "preservation order" on terms as per prayers (d), (e), (f) of the order dated 27 October 2016.

Order accordingly.